No 82-285

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In The

Supreme Court of the United States

October Term, 1982

ROBERT WYLER, DIANNE BECKER, JASPER ALEXANDER BANKS & BONNA L. QUIGLEY HOLMES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the District Court erred in refusing to grant a severance in order to allow petitioners Wyler and Becker to utilize the exculpatory testimony of a co-defendant who refused to testify unless a severance was granted.

2. Whether the District Court erred in refusing to grant petitioner banks a severance on the basis that his defense was inconsistent with the defense of his co-defendant.

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No.

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vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Robert Wyler, Dianne Becker, Jasper Alexander Banks and Bonna L. Quigley Holmes respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit affirming the judgment of conviction entered against the petitioners by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals was not recorded. Said opinion appears in the Appendix hereto at page 1a. No opinion was rendered by the District Court for the Southern District of New York.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was rendered and entered on June 14, 1982. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Rule 14 of the Federal Rules of Criminal Procedure which provides as follows:

"RELIEF FROM PREJUDICIAL JOINDER

'If it appears that a defendant or the Government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trials of counts, grant the severance of defendant or provide what other relief justice requires. In ruling on a motion by a defendant for severance the Court may order the attorney for the Government to deliver to the court for inspection in camera any statement or confession made by the defendants which the Government intends to introduce in evidence at the trial.' "

2. The Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On April 8, 1981, Indictment SSS 81 Cr. 0054 was filed in twelve counts, charging the four petitioners with various crimes arising out of the attempt to effect the escape of Wyler from the Metropolitan Correctional Center located in the Southern District of New York by means of a helicopter. Counts One through Four and Seven through Ten charged each of the four defendants with conspiracy to commit, in violation of Title 18, United States Code, Section 371, and the commission of, the following offenses: aircraft piracy, in violation of Title 49, United States Code, Section 1472(i)(1)(A) and (i)(2) and Title 18, United States Code, Section 2; interference with a flight crew member by means of a deadly and dangerous weapon, in violation of Title 49, United States Code, Section 1472(j) and Title 18, United States Code, Section 2; kidnapping, in violation of Title 18, United States Code, Sections 1201(a)(3) and 2; assault on a federal corrections officer by use of a deadly and dangerous weapon, in violation of Title 18, United States Code, Sections 111 and 2; unlawful use of a firearm, in violation of Title 18, United States Code, Sections 924(c) and 2, receipt or possession of an unregistered firearm, in violation of Title 26, United States Code, Sections 5841, 5845(a), 5861(d) and 5871 and Title 18, United States Code, Section 2, and transporting, shipping or receiving in interstate commerce a firearm which had the manufacturer's serial number obliterated, in violation of Title 18, United States Code, Sections 922(k) and 925(a) and 2.

Count Five charged Wyler alone with attempting to escape from the M.C.C., in violation of Title 18, United States Code, Sections 751(a) and 2. Count Six charged the other three defendants with aiding and assisting Wyler's attempted escape,

in violation of Title 18, United States Code, Sections 752(a) and 2. Count Eleven charged Wyler, and Count Twelve charged Banks, with receiving, while being a convicted felon, a firearm that had been shipped or transported in interstate commerce, in violation of Title 18, United States Code, Sections 922(h) and 924(a) and 2.

Prior to the commencement of the trial, Wyler and Becker moved for a severance based upon the need to call co-defendant Holmes in order to establish their defense. In support of their application, both Wyler and Becker submitted affidavits from Holmes. In the affidavits sworn to on the 28th day of April, 1981 (*see* Appendix 9a, 11a) Holmes stated that at a joint trial she would refuse to waive her Fifth Amendment right and decline to testify. However, Holmes stated further that at a separate trial for Becker and Wyler she would testify and waive her Fifth Amendment privilege. These affidavits indicated that Holmes' testimony would be exculpatory in that it would prove that Wyler and Becker were not guilty of air piracy, kidnapping, nor interfering with a flight crew member. The affidavit stated that the plan was to attempt the escape only if the helicopter pilot could be bribed into voluntarily cooperating in the escape plan. Thus, there was no conspiracy to commit the crimes of air piracy, kidnapping, nor interfering with a flight crew member. Holmes' affidavit also stated that on January 25, 1981, Becker explicitly told Holmes that she no longer wanted to participate in the planned escape attempt and was opposed to any further steps being taken by anyone to carry it out.

During the argument on the severance motion, Judge Robert Ward presiding in the District Court for the Southern District of New York expressed a concern that the Holmes' affidavit did not establish that her position was that she would testify immediately after trial regardless of her right to appeal. Ms. Holmes thereafter did in fact provide the trial court with such assurance. In an affidavit sworn to on the 13th day of July, 1981,

Holmes' states that after her own trial was concluded she would waive her Fifth Amendment right and testify at the trial of Wyler and Becker even if she had been convicted and Wyler and Becker's trials were conducted before her direct appeal had been completed (13a).

The District Court denied the application for severance as to Wyler and Becker.

The trial commenced on August 17, 1981. In their opening statements, counsel for Wyler, Becker and Holmes indicated either explicitly or implicitly that their clients were involved in arranging an escape, though denying any force, hijacking or kidnapping. Counsel for Banks contended that Banks was in no way a part of the plan to attempt to effectuate Wyler's escape. After these opening statements, Banks moved to sever on the grounds that his defense was inconsistent with the defense of his co-defendant. Said motion was denied by the District Court. On several occasions during the course of trial Banks renewed his motion for severance based upon the grounds that his defense was inconsistent with the defense of his co-defendants. On each occasion the trial court denied the application.

During the course of the trial the Government called two witnesses who were helicopter pilots who testified that they had been offered a large sum of money to fly a mission which they knew was illegal and did in fact fly several practice missions with petitioner Holmes. Each of these pilots stated that the plan had been for them to tell the authorities that they had been hijacked so as to cover their participation in the escape plan. Eventually each of the pilots decided not to take part in the illegal mission.

The Government called as a witness a pilot named Nietsche who testified that he was forced at gunpoint to land on the roof of the Metropolitan Correctional Center. Counsel for Wyler,

Becker and Holmes contended both in their cross-examinations and in their summations that the pilot was in fact a willing participant and was not being truthful in his testimony before the Court. In fact, the sole argument put forth by Wyler, Becker and Holmes was that their was no air piracy, kidnapping nor interfering with flight crew members.

The trial concluded on September 25, 1981. On said date, the jury returned a verdict of guilty as to each defendant on each count on which he was named. Robert Wyler received an aggregate sentence of 30 years. Dianne Becker, Bonna L. Quigley Holmes and Jasper A. Banks each received an aggregate sentence of 20 years.

The United States Court of Appeals for the Second Circuit affirmed the conviction of each of the petitioners.

EXISTENCE OF JURISDICTION BELOW

As stated above, petitioners were indicted and convicted in the District Court for the Southern District of New York of offenses in violation of United States Code.

The Court of Appeals for the Second Circuit has decided a federal question in a way that is in conflict with the applicable decisions of the court and with the decisions of courts of other circuits.

REASONS FOR GRANTING THE WRIT

I.

Wyler and Becker were denied a fair trial by the failure to grant a severance so as to allow them to utilize the exculpatory testimony of a co-defendant who refused to testify unless a severance was granted.

The denial of a severance motion requires a reversal of a conviction when there has been an abuse of discretion by the trial court and when said abuse results in substantial prejudice to the defendant. *United States v. Taylor*, 562 F. 2d 1345 (2d Cir. 1977), *cert. denied*, 432 U.S. 909, 97 S. Ct. 2958, 53 L. Ed. 2d 1083 (1977); *United States v. Shuford*, 454 F. 2d 772 (4th Cir. 1971). The facts of this case are such as to cause the denial of the severance motions to constitute an abuse of discretion by the trial court requiring a reversal of the conviction.

The factors that shall be considered by the trial court in determining an application for a severance have been specifically set forth in the Second Circuit. *United States v. Finklestein*, 526 F. 2d 517 (2d Cir. 1975), *cert. denied*, 425 U.S. 960, 96 S. Ct. 1742, 48 L. Ed. 2d 205 (1976). *Finklestein* provides the following guidelines to be considered by the trial court in determining a motion for severance:

> 1. The sufficiency of the showing that the co-defendant would testify at a severed trial and thereby waive his or her Fifth Amendment privileges;
>
> 2. The degree to which the exculpatory testimony would be cumulative;

3. Judicial economy;

4. The likelihood that the testimony would be subject to substantial damaging impeachment.

Holmes' affidavit sufficiently established that she would testify on behalf of Wyler and Becker at a severed trial. Said affidavit states in part that "If . . . Wyler's (Becker's) trial were severed, I would waive my Fifth Amendment right and testify in his behalf". This sworn statement clearly and unequivocally meets the test of the initial consideration in *Finklestein*. Further, in response to the trial court's expressed concern that the Holmes' affidavit did not establish that she would testify immediately after trial regardless of her right to appeal, Holmes submitted a supplementary affidavit. The supplementary affidavit stated that "I will waive my Fifth Amendment right and testify at the trial or trials of Wyler and Becker even if I am convicted and Wyler and Becker's trials are conducted before my direct appeal is completed". Holmes could do no more to establish she would testify than she did in her two affidavits. These affidavits establish as well that she would not testify if the severance were not granted. She states, "I do not intend to take the stand in my own defense or to waive my Fifth Amendment right against self-incrimination so long as the charges against me are pending", in that the severance was denied and Holmes did not testify.

The Holmes' affidavit also meets the second guidelines set forth in *Finklestein*. The second guideline has two aspects: The testimony of the co-defendant must in fact be exculpatory and secondly, it must not be cumulative.

Holmes' testimony was clearly exculpatory and necessary for Wyler's and Becker's defense. Wyler was charged not only with a conspiracy to effectuate his escape but also with air piracy, kidnapping and interference with a flight attendant.

The Holmes' affidavit establishes that her testimony would be exculpatory and essential for Wyler and Becker. Said affidavit states that

> "I would testify that although Mr. Wyler (Ms. Becker) and I had agreed to attempt to effectuate his escape by means of a helicopter from M.C.C. we had also agreed to do so only if the helicopter pilot could be bribed into cooperating with us in that escape. Mr. Wyler (Ms. Becker) never participated in any agreement and never indicated in any way that he (she) agreed to hijacking a helicopter in order to accomplish the escape."(10a, 12a).

This affidavit thus specifically sets forth the exact nature of said testimony as well as the way in which it would be exculpatory. The statement alone, if believed by a jury would have resulted in a not guilty verdict as to Counts Two, Three and Four in the indictment. This testimony was essential in that it formed the very basis of the defense put forth by counsel for Wyler and Becker. The trial testimony of the Government's own witnesses established that there was a sound basis for the argument being put forth by counsel, in that the Government called two witnesses who testified that they had in fact been offered money to fly the illegal mission. Each of these individuals, while eventually not taking part in the plan, did testify that they had been told to claim that they had been hijacked if questioned by the authorities.

Holmes was the only witness who could testify as to both the plans made with Wyler and Becker and as to what occurred in the helicopter on January 25, 1981. As well, Holmes was the one witness who could testify that Becker on January 25, 1981 stated that she no longer wanted to participate in the escape attempt and was opposed to any further steps being taken to carry

out said plan. Holmes' testimony therefore was not in any way cumulative and was highly exculpatory.

The third criteria requires a consideration of judicial economy. Though this is a serious consideration, it does not foreclose further inquiry into the issue of severance. *United States v. Finklestein, supra* at 524. The consideration of judicial economy is overcome if a joint trial would sacrifice the defendant's right to a fundamentally fair trial. In the case herein, the denial of the severance motion did make the trial fundamentally unfair.

The last consideration in the *Finklestein* guidelines is the likelihood that the testimony would be subject to substantial damaging impeachment. In fact, it is this factor alone that was relied upon by the Court of Appeals for the Second Circuit in affirming the denial of the severance motion. The Court of Appeals in its decision states that "The Government has already demonstrated its ability to impeach Holmes' testimony, since it successfully impeached the no hijacking theory at defendants joint trial." It is respectfully suggested that this statement is erroneous. It is true that the Government was able to overcome the no-hijacking theory at the joint trial. At said trial however, the defendants did not have the opportunity of putting forth Holmes' testimony. Without said testimony there was no direct evidence that could establish the defense theory put forth by counsel for Wyler and Becker. Had Holmes been allowed to testify there would have been testimony establishing that Wyler and Becker were not guilty of air piracy, kidnapping nor interference with a flight attendant. It then would have been for the jury to determine the weight to be given to this testimony.

The Court of Appeals in its decision also states that Holmes' testimony concerning Becker's withdrawal from the conspiracy could readily be impeached by Holmes' prior inconsistent statement that Becker was never in on the plan in the first place.

In fact, Holmes' affidavit clearly admits that Becker was in on the attempted escape plan. It states, however, that on January 25, Becker stated that she was withdrawing from said plan. Thus, Holmes' prior statement is not inconsistent with the defense that Becker withdrew from the escape plan.

In this case a severance was required in that Wyler and Becker's defense required the testimony of a co-defendant willing to testify if and only if a severance was granted.

The Court should grant a writ of certiorari to determine whether proper consideration was given to the various factors in deciding whether an abuse of discretion was committed by denying the severance motion of Wyler and Becker.

II.

The Court's refusal to grant Banks a severance denied him the right to a fair trial in that Banks' defense was inconsistent with the defense of his co-defendants.

In their opening statements, counsel for Wyler, Becker and Holmes indicated either explicitly or implicitly that their clients were involved in arranging an escape, though denying any force, hijacking or kidnapping. This position continued throughout the trial. Banks, in contrast denied any involvement with the attempted escape.

Following the opening statements of counsel, Banks made an application for a severance based upon the fact that Banks' defense would be irreconcilable with the defense of his co-defendant. Said application was denied. Banks renewed this motion for a severance on various occasions throughout the trial.

As a result of the denial of the severance Banks was denied the right to a fair trial. He was placed in a position where he suffered substantial prejudice as a result of being tried with his co-defendant. One aspect of this prejudice was in the area of in-court identification. Banks' co-defendants did not contest the identifications made by the Governme..t witnesses. In fact, on several occasions, counsel corraborated a witness' identification by conceding that his client was being referred to by said witness. The effect of this was to buttress the witness' credibility. By so doing, it became more difficult, if not impossible, for Banks to argue that he was improperly identified. *United States v. Johnson*, 478 F. 2d 1129 (5th Cir. 1973).

It should be noted when considering the issue of identification that an individual named Thomas McCreary was originally identified as having been the individual involved in the attempted escape as well as being the individual present in the helicopter on January 25, 1981. Pursuant to this identification McCreary was originally arrested and indicted. From this fact alone, it can be seen that Banks was prejudiced by being denied the right to properly raise the identification issue. Once the co-defendants asserted their defense, all the Government needed to do was to show that Banks had contact with the co-defendants to raise the inference that he was involved in the attempted escape.

Banks was prejudiced further as a result of the trial court's ruling throughout the trial that evidence was admissible as a result of Holmes, Wyler and Becker having opened the door by their stated theory of defense. Thus, Banks was prejudiced not only by the inevitable inferences that the jury would obviously make, but also by the testimony admitted against him which otherwise would not have been admitted into evidence.

The trial court should have granted Banks' severance at the outset of the trial. Not having done so, however, the Court had

a continuing duty to grant a severance as the prejudice from a joint trial became even more apparent. *Schaffer v. United States*, 362 U.S. 511, 805 S. Ct. 945 L. Ed. 2d 872 (1960). By denying Banks' severance, the Court denied him his right to a fair trial.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the judgment and opinions of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of June, one thousand nine hundred and eighty-two.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

FILED JUNE 14, 1982
A. Daniel Fusaro, Clerk

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE RICHARD J. CARDAMONE
Circuit Judge

HONORABLE LEONARD B. SAND*
District Judge

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* Honorable Leonard B. Sand, of the United States District Court for the Southern District of New York, sitting by designation.

Opinion

81-1471
81-1473
81-1475
81-1477

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT WYLER, DIANNE BECKER, JASPER ALEXANDER BANKS, and FONDA HOLMES,

Defendants-Appellants.

ORDER

Defendants appeal from judgments of conviction entered on November 24, 1981 following a jury trial in the United States District Court for the Southern District of New York (Ward, J.). They were charged with and found guilty of multiple counts stemming from an attempt to effectuate Wyler's escape from the Metropolitan Correctional Center (MCC) by means of an allegedly hijacked helicopter forced to land on a rooftop exercise yard. For the reasons discussed below we affirm the convictions.

1. Motions to sever trial

The district court denied motions made by Wyler and Becker to sever their trials from Holmes. It was their contention that regardless of whether Holmes took the stand at her own trial, a severance would permit her to offer exculpatory evidence on

their behalf. Holmes had executed affidavits for Wyler and Becker stating that if she were to be tried first, she would testify at their trial that the hijacking was beyond the scope of the conspiracy to effectuate Wyler's escape, which was planned with the pilot's cooperation, and that Becker had withdrawn from the conspiracy. Bank's request for a severance from all his codefendants, on the ground that his defense was inconsistent with theirs, was also denied.

A motion to sever is within the trial court's discretion, Fed. R. Crim. P. 14; *Opper v. United States*, 348 U.S. 84, 95 (1954), and its denial will not be overturned unless there is a showing of "substantial prejudice," *United States v. Stirling*, 571 F.2d 708, 733 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978). When a defendant seeks a severance on the ground that a codefendant would offer exculpatory evidence, one of the factors to be considered is the likelihood that the exculpatory testimony would be subject to substantial impeachment. *United States v. Finkelstein*, 526 F.2d 517, 523-24 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976).

If called as a defense witness by Wyler and Becker in a separate trial, Holmes would be in the anomalous position of denying the hijacking after having been convicted of it. The Government has already demonstrated its ability to impeach Holmes' testimony, since it successfully impeached the no-hijacking theory at defendants' joint trial. Moreover, any testimony by Holmes that Becker withdrew from the conspiracy could readily be impeached by Holmes' prior inconsistent statement that Becker was never in on the plan in the first place, and by Becker's own fugitive-like behavior following the escape attempt.

Opinion

Banks' defense of mistaken identity is not inconsistent with the defense asserted by the other defendants and would not therefore necessitate a separate trial. Consequently, the district court did not abuse its discretion in denying the motions to sever.

2. Wyler's claim of poisoning as a ground for escape

The district court also denied Wyler's request to present the defense that he had to escape from the MCC because he had been harassed, physically and mentally abused, beaten and poisoned (later modified to simply the poisoning claim). In order to present to a jury the affirmative defense of necessity requiring a prison escape, a defendant must show that: (1) he was faced with a specific threat of substantial bodily injury in the immediate future, (2) he had no time for complaint to authorities or a history of futile complaints, (3) he did not use force toward prison personnel or innocent persons in the escape attempt, and (4) he intended to report immediately to the authorities upon attaining a position of safety from the treat. *United States v. Boomer,* 571 F.2d 543, 545 (10th Cir.), *cert. denied,* 436 U.S. 911 (1978).

Wyler offered to prove only that on December 29, 1981 he was poisoned by prison food. A corrections officer who was supposedly going to testify that he found Wyler in a half paralyzed, unconscious state on his cell floor instead testified that Wyler complained he wasn't feeling well and had a temperature. Wyler also stated that an attorney, Mari, would testify that Wyler had complained to him of food poisoning as part of a pattern of harassment. All Wyler produced to substantiate his offer was a letter Mari wrote to the MCC stating that Wyler looked ill during a December 29, 1980 visit and Mari was later informed that Wyler believed that his condition may have been caused by tainted food; no assertion of poisoning was made.

Not only does this evidence fail to demonstrate a specific threat of immediate injury, but the episodes with respect to which the offer of proof was made took place after the escape preparation had begun. Further, there was clear evidence that he used force towards prison personnel and innocent persons, and that plans were made by defendants to go to Canada or hide out in Chelsea or New Jersey rather than report immediately to the authorities after the escape. The most telling bit of evidence against this defense is that on January 19, 1982 Wyler himself specifically requested a court order to enable him to *remain* at the MCC. Hence, the court was fully justified in denying defendant the right to present this defense.

3. Becker's claim that her attorney had a conflict of interest

Becker claims that her attorney, a firm partner in the same law firm as Wyler's attorney, ineffectively assisted her and refused to present certain defenses — i.e., that she had not agreed to a hijacking and had withdrawn from the conspiracy — because he did not want to jeopardize Wyler's case. Becker, who failed to object to multiple representation at trial, must show on appeal that an actual conflict of interest adversely affected her lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). Wyler's defense was that there was no hijacking; Becker's attorney essentially joined in this defense. The no-hijacking theory is not in conflict with either of Becker's proposed defenses. Hence, even if Becker's attorney did not present the withdrawal from the conspiracy and lack of agreement to hijack defenses to her satisfaction, his failure cannot be said to have been due to a conflict with Wyler's case. In short, Becker has failed to demonstrate any actual conflict of interest.

4. Becker's claim of insufficiency of evidence

Becker also asserts that the evidence against her on the hijacking related counts 2, 3 and 4 is insufficient to sustain her conviction. After conviction the evidence must be viewed in a light most favorable to the government, drawing all rational inferences in support of the guilty verdict. *See Glasser v. United States,* 315 U.S. 60, 80 (1942). Becker was convicted on the conspiracy count and does not claim insufficiency of the evidence on that charge. Under the law of conspiracy she would be liable for all acts of co-conspirators which were in furtherance of and not beyond the scope of the conspiracy. *See Pinkerton v. United States,* 328 U.S. 640, 645-48 (1946). After Mercado had told Becker of Wyler's plan to hijack a pilot, Becker continued to participate in the scheme. Hence, viewing the evidence in a light most favorable to the government, the hijacking was not beyond the scope of the conspiracy and she is answerable for the charges stemming from it.

5. Wyler's Fifth Amendment claim

The district court permitted the government to introduce Redmond's testimony that he had had a conversation about the escape with Wyler sometime after the attempt had failed and that Wyler had said nothing to indicate the pilot was in on the deal or had received money. Wyler claims this testimony violated his Fifth Amendment right to remain silent and was inadmissible hearsay. The right to remain silent applies to custodial interrogation by law enforcement authorities, *Miranda v. Arizona,* 384 U.S. 436 (1966), and to a defendant's refusal to testify at trial, *Griffin v. California,* 380 U.S. 690 (1965). It has no application to a conversation between Redmond and Wyler. Hence, Wyler's Fifth Amendment claim is spurious. Even

assuming that this evidence was inadmissible hearsay, its admission constitutes harmless error.

6. Hearsay statement of helicopter pilot

Officer Yacca, who heard pilot Nietsche's account of the hijacking right after it occurred, was permitted at trial to relate much of what Nietsche told him. Defendants urge that this testimony was inadmissible hearsay. Its purpose was to give evidence of Nietsche's state of mind and demeanor to indicate that he had indeed been hijacked. That portion of the evidence which referred to Nietsche's demeanor was admissible because, in order to prove that there had been a hijacking, the government needed to prove the element of intimidation, force or violence. *See United States v. Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972). As for the rest of the testimony, in view of the cautionary instructions given by the trial court we do not believe it was error to admit it. However, even were it inadmissible, this brief recounting of the same evidence which Nietsche had testified to was merely cumulative and falls within the harmless error standard.

7. Testimony before the grand jury

Defendants urge this Court to dismiss the indictment because the grand jury heard hearsay evidence. Hearsay testimony may be presented to a grand jury, *Costello v. United States*, 350 U.S. 359 (1956), so long as the jury is not misled as to its hearsay nature, *United States v. Estepa*, 471 F.2d 1132, 1336 (2d Cir. 1972). Here the grand jury was informed that the hijacking testimony it heard was hearsay. Even though Redmond was asked leading questions an indictment may not normally be attacked by contesting such matters as compliance with evidentiary rules. *See United States v. Calandra*, 414 U.S. 338, 349 (1974). Finally, it is claimed that

pilot Berg perjured himself before the grand jury. Such fact did not come to light until the eve of trial. Considering all of the evidence presented (e.g., Redmond's testimony that Wyler told him he was planning a hijacking), it is highly doubtful that the grand jury would not have returned the indictments even had they known this additional fact.

s/ Wilfred Feinberg
WILFRED FEINBERG
Chief Judge

s/ Richard J. Cardamone
RICHARD J. CARDAMONE
Circuit Judge

s/ Leonard B. Sand
LEONARD B. SAND
District Judge

AFFIDAVITS OF FONDA HOLMES DATED APRIL 30, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ROBERT WYLER, et al.,

Defendants.

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

FONDA HOLMES, being duly sworn, deposes and says:

I make this affidavit in support of a motion by Dianne Becker, a defendant in the above-captioned case, for a severance. The factual allegations herein are based on personal knowledge, information and belief and conversations I have had with my attorney and Ms. Becker's attorney.

I am a co-defendant in the above-captioned case. I do not intend to take the stand in my own defense or to waive my Fifth Amendment right against self-incrimination so long as the charges against me are pending. If, however, Ms. Becker's trial were severed, and were conducted after the conclusion of the proceedings against me, I would waive my Fifth Amendment right and testify in her behalf.

The government's theory of this case is that Ms. Becker conspired with myself and others to effectuate the escape of co-

Affidavits of Fonda Holmes Dated April 30, 1981

defendant Robert Wyler from the Metropolitan Correctional Center in New York City (Count I). According to the government, we intended to carry out this escape by hijacking a helicopter, if necessary, and forcing its pilot to fly to the roof of the M.C.C. where we would pick up Mr. Wyler (Count II).

I would testify that although Ms. Becker and I had agreed to attempt to effectuate the escape of Mr. Wyler from M.C.C. by means of a helicopter, we had also agreed to do so only if the helicopter pilot could be bribed into cooperating with us in that escape. Ms. Becker never participated in any agreement and never indicated in any way that she agreed to hijacking a helicopter in order to accomplish the escape.

Moreover, following a meeting with myself and the helicopter pilot at Sarge's Deli on the morning of January 25, 1981, Ms. Becker informed me that she no longer wanted to participate in the escape attempt and was opposed to any further steps being taken by anyone to carry it out.

Since Ms. Becker was not present in the helicopter or at the M.C.C. that day, she had no way of knowing what actually occurred at either of those locations.

s/ Fonda Holmes
FONDA HOLMES

Sworn to before me this
30th day of April, 1981

(illegible)

Affidavits of Fonda Holmes Dated April 30, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ROBERT WYLER, et al.,

Defendants.

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

FONDA HOLMES, being duly sworn, deposes and says:

I make this affidavit in support of a motion by Robert Wyler, a defendant in the above-captioned case, for a severance. The factual allegations herein are based on personal knowledge, information and belief and conversations I have had with my attorney and Mr. Wyler's attorney.

I am a co-defendant in the above-captioned case. I do not intend to take the stand in my own defense or to waive my Fifth Amendment right against self-incrimination so long as the charges against me are pending. If, however, Mr. Wyler's trial were severed, and were conducted after the conclusion of the proceedings against me, I would waive my Fifth Amendment right and testify in his behalf.

The government's theory of this case is that Mr. Wyler conspired with myself and others to effectuate his escape from

the Metropolitan Correctional Center in New York City (Count I). According to the government, we intended to carry out this escape by hijacking a helicopter, if necessary, and forcing its pilot to fly to the roof of the M.C.C. where we would pick up Mr. Wyler (Count II).

I would testify that although Mr. Wyler and I had agreed to attempt to effectuate his escape by means of a helicopter from M.C.C. we had also agreed to do so only if the helicopter pilot could be bribed into cooperating with us in that escape. Mr. Wyler never participated in any agreement and never indicated in any way that he agreed to hijack a helicopter in order to accomplish the escape.

Since Mr. Wyler was not present at the airport or in the helicopter on January 25, 1981, he had no way of knowing what transpired between the helicopter pilot and myself.

s/ Fonda Holmes
FONDA HOLMES

Sworn to before me this
30th day of April, 1981

(illegible)

AFFIDAVIT OF FONDA HOLMES DATED JULY 13, 1981

SSS 81 Cr. 0054 (RJW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ROBERT WYLER, et al.,

Defendants.

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

FONDA HOLMES, being duly sworn, deposes and says:

I am a defendant in the above-captioned case. I make this affidavit in support of the previously filed motions by co-defendants Wyler and Becker to have their trials severed from my trial.

In addition to my previous affidavits in support of these motions, I hereby state that after my own trial is concluded, I will waive my Fifth Amendment rights and testify at the trial or trials of Wyler and Becker even if I am convicted and Wyler and Becker's trials are conducted before my direct appeal is completed.

s/ Fonda Holmes
FONDA HOLMES

Sworn to before me this
13th day of July, 1981

(illegible)